

PASSING AND TRESPASSING IN THE ACADEMY: ON WHITENESS AS PROPERTY AND RACIAL PERFORMANCE AS POLITICAL SPEECH

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I. INTRODUCING OUR GRANDMOTHERS

Cheryl Harris begins her canonical piece, *Whiteness as Property*, by introducing her grandmother Alma. Fair skinned with straight hair and aquiline features, Alma “passes” so that she can feed herself and her two daughters. Harris speaks of Alma’s daily illegal border crossing into this land reserved for whites. After a day’s work, Alma returns home each evening, tired and worn, laying aside her mask and reentering herself.¹ “No longer immediately identifiable as ‘Lula’s daughter,’ Alma could enter the white world, albeit on a false passport, not merely passing, but trespassing.”²

In this powerful metaphorical narrative of borders and trespass, of masking and unmasking, of leaving home and returning to reenter oneself, we feel the central truths of Harris’s theory. She asserts that whiteness and property share the premise and conceptual nucleus of a right to exclude,³ that the rhetorical move from slave and free to black and white was central to the construction of race,⁴ that property rights include intangible interests,⁵ that their existence is a matter of legal definition, that the

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1. Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1711 (1993).

2. *Id.*

3. *Id.* at 1736 (“The right to exclude was the central principle, too, of whiteness as identity . . . [t]he possessors of whiteness were granted the legal right to exclude others from the privileges inhering whiteness; whiteness became an exclusive club whose membership was closely and grudgingly guarded.”).

4. *Id.* at 1718.

5. *Id.* at 1728 (“Modern theories of property reject the assumption that property is ‘objectively definable or identifiable’ Property in this broader sense encompassed jobs, entitlements, occupational licenses, contracts, subsidies, and indeed a whole host of intangibles that are the product of labor, time, and creativity, such as

law values and protects existing regimes of power and white supremacy, and that those regimes are deemed permanent.⁶

For many years now, on the first day of class in my seminars on Critical Race Theory and Race Law and Literature, I have asked my students to bring photographs of their maternal grandmothers to class with them. The class begins with students introducing themselves and then their grandmothers. I tell my students that I want them to keep their grandmothers in the room throughout the semester, to keep them by their sides as they read the assigned materials and write their reflection pieces, to speak up and give them a voice if, during a class discussion, their grandmothers would want to respond to a comment by a classmate or ask a question. My initial purpose in this pedagogy was to remind us of the wealth of our diversity, to encourage students of color especially, but also white students, to bring the stories of their families and communities into this discourse on the law.⁷ Through this exercise, we answer Mari Matsuda's call for us to look to the bottom and hear the voices of the excluded, to learn that listening to these voices is central to critical theory and practice.⁸

But as I taught *Whiteness as Property* just two weeks before UCLA's Critical Race Studies Symposium, moving it up on my syllabus to help me to prepare for the event, I recognized another lesson contained in Harris's story and in my pedagogy. Our grandmothers, like Harris's, are trespassers on this white property of intellectual and legal discourse. They would cross this border without the appropriate papers of qualification and merit, signified by admission to the academy or the bar. The rules define them as "unqualified," deem their voices and experience irrelevant, deny them identity, status and access.

If our grandmothers do not belong here, how have we come to belong? How have we managed this border crossing? Are we granted access because, like Alma, we are no longer identifiable as our people's daughters and sons?⁹ I ask my students to tell me about a time when they felt as if they were "passing," whether Harris's grandmother's story of making herself invisible feels familiar to them. If the law now forbids the "whites only" signs and the formal rules and practices that required Harris's grandmother to pass, why does their experience feel like passing?

intellectual property, business goodwill, and enhanced earning potential from graduate degrees.") (internal citations omitted).

6. *Id.* at 1723–24, 1730.

7. I first used this exercise in 1996 at a Society of American Law Teachers workshop. My talk explored the causes of backlash against affirmative action and the still new presence in the academy of persons of color, women and gay and lesbian faculty. I asked my colleagues, at the workshop, who were then still a largely straight white male group, to introduce their maternal grandmothers. The exercise revealed that all of us had left significant parts of our identity and ourselves outside the academy's gates. See CHARLES LAWRENCE & MARI MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 225–27 (1997).

8. See generally Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

9. Harris, *supra* note 1, at 1711.

Harris teaches that, although the court in *Brown v. Board of Education*¹⁰ condemned legalized segregation in schools as inherently unequal, and rejected the property right of whites in officially sanctioned inequality, it “failed to expose the substantive inequality in material terms produced by white domination and race segregation.”¹¹ De facto white privilege remained unaddressed. *Brown* ratified and reified the status quo of substantive inequality and sheltered white expectations of race-based privilege. The transition from old to new forms of whiteness as property is achieved in this legitimization of substantive inequality and settled expectations of relative white privilege.¹²

When people of color come to the academy, a place where inequality is institutionalized and rationalized, we trespass on white property. Our presence violates settled expectations that the status quo of white privilege will not change.¹³ But now that the law has abolished formal segregation, fair skin, straight hair and aquiline features are no longer the only disguises that allow us to pass. The new narrative that rationalizes the property of white privilege claims that race has no meaning. I call this story the “Big Lie.”¹⁴ White supremacy requires this new version of the old story because anti-racist movements have achieved significant successes in contesting the narrative that justified racial domination by the slaver’s lash and the colonizer’s gun. The master’s method has shifted, if only in emphasis, from domination to hegemony.¹⁵ But the hegemonic project must enlist the minds and voices of some of us who are racially subordinated. If we think about Harris’s metaphor of “passing and trespassing,” it can help us understand how the new “colorblind post-racial” narrative seeks to seduce and enlist us in white supremacy’s new hegemonic project. “Come join us,” it calls. No need to look white, although

10. 347 U.S. 483 (1954).

11. Harris, *supra* note 1, at 1752; see also Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

12. Harris, *supra* note 1, at 1731 (“When the law recognizes, either implicitly or explicitly, the settled expectations of whites built on the privileges and benefits produced by white supremacy, it acknowledges and reinforces a property interest in whiteness that reproduces Black subordination.”).

13. The virulence and persistence of the backlash against affirmative action are testimony to the strength of those expectations.

14. See LAWRENCE & MATSUDA, *supra* note 7, at 67–87.

15. Critical race theorists have theorized the phenomenon and process of racial formation or construction and given the name “racial projects” to the discursive and cultural initiatives that contest, organize, and explain the distribution of political and material resources along racial lines. See HOWARD WINANT, *RACIAL CONDITIONS: POLITICS, THEORY, COMPARISONS* (1994); john a. powell, *The “Racing” of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. 99 (1997); Michael Omi, *Racial Identity and the State: The Dilemmas of Classification*, 15 LAW & INEQ. 7 (1997). Race is a social and legal construction—a conceptual mechanism, ideology and political device employed to subordinate people of color and to justify that subordination. Subordinated communities and anti-racists’ popular movements have engaged in projects of racial construction and signification that resist and contest racism. However, the racial project that advances the ideology of white supremacy dominates this contest and the dehumanizing story this project tells is the master narrative.

it might help. All you need do to gain access to the new white property is to join us in the racial project, in helping us tell the “Big Lie.”

The new whiteness as property no longer marks its borders with Jim Crow’s “white” and “colored” signs. Instead, structural racism and white privilege are legitimated by those signs’ absence.¹⁶ In the context of this “post-racial” project, we must understand the invitation to “pass,” to differentiate from those other blacks, within contemporary racial formation’s theoretical framework. Our racial identity, our presentation of self, what some theorists have called “racial performance,”¹⁷ either participates in white supremacy’s master narrative, or contests that narrative. When people of color participate in the narrative of colorblindness, we “pass.” When we say that our race signifies nothing, we support the post-racial project that protects and defends white property by denying its existence. Moreover, we deny our relationship with our community, and we join in the signification of other blacks as less-than-human.¹⁸

II. REPRESENTING THE RACE: MY GRANDMOTHER’S WARNING AND A LETTER FROM DR. DUBOIS

Henry Louis Gates calls the autobiographies of Fredrick Douglas and the larger body of literature of the black slave “the most obvious site to excavate the origins of African American literary tradition.”¹⁹

The texts of the slave could only be read as testimony of defilement: the slaves’ *representation* and reversal of the master’s attempt to transform a human being into a commodity, and the slaves’ simultaneous verbal witness of the possession of a humanity shared in common with Europeans The slave wrote not primarily to demonstrate humane letters, but to demonstrate his or her own membership in the human community.²⁰

16. See Harris, *supra* note 1; Freeman, *supra* note 11; LAWRENCE & MATSUDA, *supra* note 7; Ian Haney-Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994); Kimberlè Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (arguing that formal equality actually strengthens and reinforces white privilege by declaring that only laws which classify by race on their face will be treated as suspect, leaving private, institutional and structural white privilege and property in place).

17. See BELL HOOKS, *TALKING BACK: THINKING FEMINIST, THINKING BLACK* (1989); TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* (1993); ROBERT GOODING-WILLIAMS, *LOOK A NEGRO!: PHILOSOPHICAL ESSAYS ON RACE, CULTURE, AND POLITICS* (2006); KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2007); HENRY LOUIS GATES, *THE SIGNIFYING MONKEY: A THEORY OF AFRICAN-AMERICAN LITERARY CRITICISM* (1988).

18. See Charles Lawrence, ‘Acting Our Color’: *Racial Reconstruction and Identity as Acts of Resistance*, 18 UCLA ASIAN PAC. AM. L.J. 21, 30 (2013) (relating the story of Lawrence’s great uncle who passed for white, highlighting that “. . . when my uncle passed and accepted the privileges of whiteness, he was also required to participate in the narrative that constructed the family he left behind as Black and inferior.”). See Randall Kennedy, *Racial Passing*, 62 OHIO ST. L.J. 1145 (2001); ALLYSON HOBBS, *A HISTORY OF RACIAL PASSING IN AMERICAN LIFE* (2014).

19. GATES, *supra* note 17, at 127.

20. *Id.* at 128.

From a very early age I remember receiving explicit and implicit lessons in the proper practice of racial representation. When my grandmother corrected me for slurping my soup or putting my elbows on the table, she would ask, "Would you eat like that if the president invited you to dinner at the White House?" I knew this question was meant to convey more than my grandmother's own high expectations regarding table manners. It also contained an admonition about my responsibility for racial representation. I must understand that my burden in this responsibility was significant because white people would expect me (us) to be crude and unmannered. I was responsible for demonstrating that we were not as white people imagined us. This performance of race, sometimes pejoratively referred to as the politics of respectability, represents the race by performing against the narratives of intellectual inferiority, laziness, criminality, buffoonery, and savagery that mark us as less human, as not fit for citizenship.

I also learned to represent the race by speaking out against racism, by naming it when I saw it, by fighting against the structures that maintain white supremacy and the laws and narratives that rationalize and justify it. This too was a lesson learned before I had language to speak it. At one month of age I received a letter from my father's teacher. "My Dear Sir:" it read, "May I congratulate you upon your advent into this astonishing world and hope that you may be able to do something toward straightening it out. Very sincerely yours, W. E. B. DuBois." The letter, framed together with a picture of DuBois hangs on the wall above my desk today.

I learned the practice of racial representation as anti-racist politics from my parents who broke racial barriers in their professions, who stood in vigils, picketed, marched, preached at churches and spoke at conferences, and from their friends and comrades in the struggle who came to sit at our dinner table to talk about the "race question."²¹ I watched them live DuBois's instruction to me.

My sisters and I grew up surrounded by dangerous black men and women who taught us two separate but related traditions, racial performance and racial resistance. Yet, even with the legacy of these wonderful teachers, the mastery of this vocation challenges me. How do I perform race as respectability and also perform race to name, challenge and disrupt injustice? What feelings do I experience as I negotiate this performance? When have I remained silent about the anger, fear, and humiliation I experienced in the face of racism as well as the longing, joy, pride and love that I have known in anti-racist struggle? What silences me? What

21. In 1955, when I was eleven years old, a young Martin King, Ralph Abernathy and Fred Shuttlesworth came to New York to participate in a non-violence training workshop conducted by the Fellowship of Reconciliation, a national peace organization where my father served as national president. During the training they came to our house for dinner. Bayard Rustin, James Farmer, James Lawson, Kenneth Clark, and John Hope Franklin were among the civil rights activists who occasionally gathered at our dining room table for a meal and intense political strategizing and conversation.

violence, laws or social expectations censor our anti-racist speech, and what gives us courage to speak out?

III. "DANGER! EDUCATED BLACK MAN": RACIAL PERFORMANCE AND POLITICAL SPEECH

A. *My Nephew's Gift*

In the spring of 2002 I received a package from my nephew Abram Wehmiller. I opened it to find two identical black t-shirts. The front of the shirts bore an image of a road sign like those that warn drivers of an approaching construction site or falling rock zone. The sign read: "DANGER, Educated Black Man." Abe had enclosed a note. "Dear Uncle Chuck, I gave one of these shirts to each of the seven black young men in my school's graduating class. I thought you should have at least two."

Abe had been teaching history and coaching basketball at an elite preparatory school in Dallas, Texas for almost four years. One of only a handful black teachers at the school, I knew that Abe had supported, sheltered, challenged and fed each of these seven young men as they negotiated the foreign world of this predominantly white school. I smiled with pride at the thought of Abe sending these young men out into the world with a lesson to wear on their chests, to remind the world and themselves that their education had made them dangerous to white supremacy and that they should wear that dangerousness with responsibility and pride. I knew that Abe would know that I was also smiling at our mutual admiration. He knew I was smiling at his pride in his uncle's dangerousness and at what he knew was my pride in him for carrying on the family business, a vocation we had both inherited from my father, Abram's grandfather.

Chapter VI of Fredrick Douglass's 1845 autobiography, *Narrative of the Life of Frederick Douglass, An American Slave*,²² the definitive story of the dangers of black education, opens with a scene of literacy instruction. The young Douglass is being taught to read by his mistress, Sophia Auld, but his master interrupts the lesson. Hugh Auld warns his wife that it is both unlawful and unsafe to teach a slave to read.

If you give a nigger an inch, he will take an ell. A nigger should know nothing but to obey his master—to do as he is told. Learning would spoil the best nigger in the world . . . it would forever unfit him to be a slave. He would at once become unmanageable and of no value to his master. As to himself, it could do him no good, but a great deal of harm. It would make him discontented and unhappy.²³

I loved Abe's shirt because it spoke Douglass's discovered truth, a truth too often denied by today's narratives of "no child left behind," "reverse discrimination," "colorblind constitutions" and "post-racial

22. FREDERICK DOUGLASS, *NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE* (1845).

23. *Id.* at 58.

worlds.” Part of me could not wait to wear it. I wanted to confront my colleagues at Georgetown with my blackness and America’s racism, to make them feel the discomfort that would come with this reminder of our shared history of slavery and Jim Crow.

I kept putting it off. Each time I planned to wear the shirt to work I imagined the unease, embarrassment, or anger my shirt might induce in my colleagues. One morning I actually put the shirt on and then thought better of it and took it off. I feared that many of my colleagues would experience the shirt’s message as a personal attack. I worried they would think, “We welcomed Chuck and befriended him and now, with this shirt, he calls us racist.”

I asked myself why I should worry about my colleagues’ discomfort or annoyance. I was a tenured full professor, secure in my job and relatively secure in my reputation as a scholar and teacher. I had written controversial articles and books on the ubiquity of unconscious racism, affirmative action and hate speech. I’d spoken out against institutional and structural racism in faculty meetings and at protest rallies. Why would I hesitate to wear my nephew’s wonderful gift?

I finally wore the shirt to school on a day when I was not scheduled to teach. I was acutely aware of peoples’ eyes on me and of their expressions as they passed. I am not a self-conscious person. I feel at ease in social situations even when I am among strangers and the hallways of Georgetown Law Center had been home to me for almost ten years, but now I felt newly exposed and vulnerable.

In the hall on my way to the office, several black students flashed knowing smiles and nodded their approval, as did the two black security guards at the door. Two white students who were taking a seminar with me stopped to read the shirt as I waited for the elevator. They smiled, as if to say, “We recognize this genre of Lawrence pedagogy and we want you to know that we got the point.” Most people in the crowded hallways and elevators passed me by without seeming to notice the shirt, as if I were wearing my accustomed shirt and tie. My colleagues were about equally divided between those who commented on the shirt and those who acted as if they did not notice. Close friends on the faculty stopped me to chat about the shirt or came by my office because they’d heard about it from a friend. Many asked where I’d found the shirt and I told them the story of my nephew’s gift to his students and to me. None of the people who spoke to me about the shirt seemed offended or put off by the shirt’s message. The people who knew me best expected nothing less from me. But I felt a difference between the responses of my black colleagues and even my closest white friends. My black colleagues needed to say very little. A knowing look, a resigned sigh, or a brief embrace said they knew what it meant and felt like to be a dangerous black person. They knew what it felt like for me to wear the shirt. They knew I was wearing it for all of us.

I had anticipated the silence from colleagues who acted as if I did not wear a big danger sign on my chest. I knew that by wearing this shirt I was breaking a taboo, an implicit agreement that we would not talk about racism when we met each other in the halls, certainly not our own racism.

They allowed me to say these things out loud in my scholarship, in lectures and even in the classroom, but this was different. They chose not to respond to my provocation, not to join this transgression of social etiquette. I felt some sympathy, and I must admit some gratitude, for their silence. I was relieved that I could avoid the hard conversation my shirt invited.

I had worn the shirt out of a sense of responsibility and obligation. If I could not wear this shirt, how could my nephew expect the young men he had given the shirt to do so? But now that I'd worn it, I was relieved and glad to postpone the conversation with my colleagues, to save it for a safer place, to revisit it at another time.

B. *Teaching a Class in Performance Art*

Several years later, Mary Babcock, a young colleague in the art department at the University of Hawaii who teaches a class in performance art, invited me to come and talk with her students about how I used performance in my work. When I asked if she could tell me something more about what the class might want to hear from me, she responded with a question. "What does it mean to you to think about your work as performance?" she asked. Something about Professor Babcock's question opened a new lens for me, a new way of thinking about the work I do as a lawyer, teacher, activist, parent and critical race scholar. Her question encouraged me to think broadly about my work, as vocation, as something that I was called to do.²⁴ She had asked an artist's question about what it *meant* to represent, convey, or articulate an idea or feeling through a particular form or method (performance, rather than drawing, sculpture or words). This question about meaning resonated with much of my own theoretical work about the meanings we give to the law's narratives and the importance of interrogating and revealing unexamined meanings in those narratives.²⁵ I knew now that I would talk with her students about performing race and how racial performance is central to the politics of anti-racism and therefore central to my work.

On the day I visited Professor Babcock's class I wore my "Danger, Educated Black Man" shirt. I stood at the front of the classroom with a screen behind me displaying a slide show with a series of visual images—iconic representations of African Americans as white America has imagined us: a drawing of Little Black Sambo; a white minstrel performer in blackface; a cartoon caricature of a black uniformed waiter with huge distorted lips in a wide smile, the restaurant's name printed on his white teeth—"Coon-Chicken Inn;" advertisements for Aunt Jemima Pancakes and Rastus Cream of Wheat; a photograph of Flavor Flav—a contemporary minstrel in clownish garb. Interspersed among these images I have placed a photograph of myself dressed in a suit and tie, a photograph of the Reverend Jeremiah Wright wearing afro-centric vestments and a pho-

24. See Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231 (1992); VINCENT HARDING, *THERE IS A RIVER* (1981).

25. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) [hereinafter *The Id, the Ego, and Equal Protection*]; Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1984).

tograph of President Obama as he delivered the State of the Union address.

I tell Professor Babcock's students that I brought the slide show with me to make visible the host of characters who join me on the stage each time I speak. When I teach a class, give a lecture, write an article, or go to a colleague's house for dinner I am always performing race and I always perform surrounded by the cast of characters that scrolled behind me on the screen.

In *Black Skin, White Masks*, Franz Fanon tells the story of his encounter with a small white boy and his mother in order to describe the lived experience of being black in what he calls "pervasively negrophobic societies."

"Look! A Negro!" *It was a passing sting. I attempted a smile.*

"Look! A Negro!" *Absolutely. I was beginning to enjoy myself.*

"Look! A Negro!" *The circle was gradually getting smaller. I was really enjoying myself.*

"[Momma], look, a Negro; I'm scared!" *Scared! Scared! Now they were beginning to be scared of me. I wanted to kill myself laughing, but laughter had become out of the question.*

*I couldn't take it any longer, for I already knew there were legends, stories, history, and especially historiocity . . .*²⁶

Fanon suggests that these legends, stories, history and the daily "Look, a Negro!" encounters impose a "racial epidermal schema," an image of Negro bodies foisted upon blacks "that ha[s] been superimposed on one's body and comes to haunt it like a shadow."²⁷

When I speak of race as performance, I understand that my performance must challenge and oppose the stereotypes and racist images that white supremacy's narrative projects on my body and encourages me to claim as my own. I must be well-spoken, well-dressed, well-mannered, serious, supremely competent and non-threatening. I must present myself as unlike these images of blackness that surround me. I must remind myself that they are not me. Yet, I know the people represented in these images are my kin. It will not do for me to say we are not related.

In a 1987 article titled, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*,²⁸ I argued that the law should acknowledge and take cognizance of our ubiquitous and often unconscious racism. I introduced my legal argument with a story from my childhood. I told of my feelings of pain, shame and self-loathing as I listened to my teacher read the book *Little Black Sambo* and heard my classmates laugh at its stereotyped portrayal of a savage, uncivilized, ignorant, ugly little boy and realized that I was that little boy, that my classmates were laughing at me.²⁹ I closed the narrative with a story from my first year at college.

26. FRANTZ FANON, *BLACK SKIN, WHITE MASKS* 91–92 (2008).

27. GOODING-WILLIAMS, *supra* note 17, at 8.

28. Lawrence, *supra* note 25.

29. *Id.* at 317. The prologue to *The Id, the Ego and Equal Protection* begins with the following description of my experience:

A dozen years later I am a student at Haverford College. Again, I am a token black presence in a white world. A companion whose face and name I can't remember seeks to compliment me by saying, "I don't think of you as a Negro." I understand his benign intention and accept the compliment. But the knot is in my stomach again. Once again, I have betrayed myself.

This happened to me more than a few times. Each time my interlocutor was a good, liberal, white person who intended to express feelings of shared humanity. I did not yet understand the racist implications of the way in which the feelings were conceptualized. I am certain that my white friends did not either. We had not yet grasped the compliment's underlying premise: To be thought of as a Negro is to be thought of as less than human. We were all victims of our culture's racism.³⁰

I first told this story to demonstrate the ubiquity of our infection with the ideology and disease of racism and to show how all of us internalize white supremacy's narratives and beliefs. My friends' and my own failure to recognize the racist premise of the "compliment" was evidence of our shared unconscious racism, and the universality of our unconscious racism was central to my argument in that article.³¹

I tell the story again here because my friend's compliment can also be understood as an offer to "pass," to be accepted, as equal and fully human by becoming the exception to blackness, to say, "I am not Sambo" and to join the narrative that depicts most black folks as less than fully human.

It is circle time in the five-year old group, and the teacher is reading us a book. As she reads, she passes the book around the circle so that each of us can see the illustrations. The book's title is *Little Black Sambo*. Looking back, I remember only one part of the story, one illustration: Little Black Sambo is running around a stack of pancakes with a tiger chasing him. He is very black and has a minstrel's white mouth. His hair is tied up in many pigtailed, each pigtail tied with a different color ribbon. I have seen the picture before the book reaches my place in the circle. I have heard the teacher read the "comical" text describing Sambo's plight and have heard the laughter of my classmates. There is a knot in the pit of my stomach. I feel panic and shame. I do not have the words to articulate my feelings—words like "stereotype" and "stigma" that might help cathart the shame and place it outside of me where it began. But I am slowly realizing that, as the only black child in the circle, I have some kinship with the tragic and ugly hero of this story—that my classmates are laughing at me as well as at him. I wish I could laugh along with my friends. I wish I could disappear.

30. *Id.* at 318.

31. *Id.* at 322. Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.

C. *Covering: Coerced Assimilation as Censorship*

In his book, *Covering: The Hidden Assault on Our Civil Rights*,³² Professor Kenji Yoshino, an out gay legal scholar, tells a story from his early days at Yale Law School. "When I began teaching a colleague took me aside. 'You'll have a better chance at tenure,' he cautioned, 'if you're a homosexual professional than if you're a professional homosexual.'"³³ Yoshino reads this friendly advice as coerced assimilation. He is offered full membership in this elite academic club. It's ok with us if you are gay, just don't perform gayness, don't confront us with our homophobia or make it central to your work. Don't wear your Dangerous Queer Man shirt to work. No need to stay in the closet, but you must "cover" that shirt. Thus, his title, *Covering*.

Yoshino argues that this new generation of discrimination "directs itself not against the entire group, but against the subset of the group that fails to assimilate to mainstream norms Outsiders are included, but only if we behave like insiders This covering demand is the civil rights issue of our time. It hurts not only our most vulnerable citizens but our most valuable commitments."³⁴

The coercion to behave like insiders that Yoshino speaks of injures us by requiring us to hide, deny and participate in the defamation of important parts of ourselves, and this surely is a grievous injury. But the covering demand inflicts another kind of injury on our collective efforts to realize a just community. It censors speech that uncovers or "outs" continuing oppression. This silencing of speech or performance that uncovers our continuing racism or homophobia is especially harmful when the dominant narrative calls itself "post-racial" and claims racism no longer exists. If we perform race to challenge and reconstruct white supremacy's contemporary colorblind narrative, the assimilationist demand to leave my shirt at home is more than a restriction on my choice of individual identity. It also silences anti-racist speech.

IV. THE MAUNA KEA MURAL: WHITENESS AS PROPERTY AND THE FIRST AMENDMENT

Last spring in my seminar in Law Race and Literature one of my students, Kahikina de Silva, wrote a reflection responding to an article by Charles Lawrence entitled *Acting Our Color: Racial Re-Construction and Identity as Acts of Resistance*.³⁵ She wrote:

Last weekend, a woman I am privileged to call a friend—a Kanaka Maoli artist from Maui, who is also a student at UHM—organized the painting of a community mural on a section of the plywood wall fronting the construction at our own Campus Center. Over a hundred students, faculty, parents, keiki, and community mem-

32. YOSHINO, *supra* note 17.

33. *Id.* at 17.

34. *Id.* at 22–23.

35. Charles R. Lawrence III, "Acting Our Color": *Racial Re-Construction and Identity as Acts of Resistance*, 18 UCLA ASIAN PACIFIC L.J. 21 (2013).

bers helped recreate the stunning outline of Mauna Kea, and populated the painting with our ancestors Papa, Wakea, Ho'ohokukalani, and Haloa, and their taro-people descendants. Included in the mural was a section covered in blackboard paint, with the understanding that the public could participate in the artist's purpose of opening awareness and communication by writing comments in response to the work.

Yesterday, I joined this group of kanaka—which had already grown well past the 200-person mark—not to paint, but to rally in protest of Ka Leo's decision to paint over the blackboard section, which had by then included the statement: "UH cannot be a Hawaiian place of learning while leading the destruction of our sacred mountain." In response, we chanted, prayed, spoke of free speech and the kuleana to hold landowners like UH accountable for their actions. We signed a petition demanding a public apology and urging Ka Leo to walk with us in creating a University truly dedicated to open discussion, even in controversial issues. And we put our sidewalk chalk to work, writing messages of aloha 'aina on the mural, the sidewalks, and the courtyard in front of the Ka Leo office. The number and sentiment of those that gathered in opposition to this institutional silencing of an all-too-often muffled narrative was truly inspiring, and reminded me of the value there is in gathering the tellers of such marginalized stories, if for nothing else than to find the reassurance that we are not "crazy" and we are not alone.³⁶

Mari Matsuda and I had also attended this rally, and we too experienced a joyful excitement and energy as we greeted colleagues, students and friends. We had received an email inviting us to attend from two Hawaiian colleagues only the night before. We were thrilled to see how many people had come on short notice in the middle of a Wednesday morning, and we could see how much it meant to the artists, and the students who had organized the protest, to see so many of us who were not Hawaiian ready to lift our voices in response to their call for support.

As the mural controversy emerged, people treated it as a free speech case. The student artists who painted the mural and the organizers of the subsequent demonstration sought my counsel as a constitutional scholar and, in response to the protest, the University and Ka Leo, the student newspaper, organized a panel to discuss the "rights and responsibilities" of free speech on campus.

In many ways the events that led to the protest had the makings of a Constitutional Law professor's dream First Amendment fact pattern. Ka Leo, the UH Manoa student newspaper, was sponsoring an arts festival. As part of the festival, they solicited proposals from artists to create murals to cover the plywood wall enclosing a construction site at Campus Center. Among others, Ka Leo selected the Kanaka artist's proposal for a

36. Kahikina de Silva, Student reflection piece written for seminar in Race Law and Literature (2013) (unpublished manuscript) (on file with author).

community mural about Mauna Kea. On Saturday and Sunday, about 80 students, faculty and community people helped paint the mural. Several students added handwritten messages on the blackboard portion of the mural including the following statement:

"UH CANNOT BE A HAWAIIAN PLACE OF LEARNING WHILE LEADING THE DESECRATION OF MAUNA A WAKEA."

"HEY UH, BE ACCOUNTABLE. . ."

"BE A HAWAIIAN PLACE OF LEARNING!"

"STAND WITH THE PEOPLE!"

"STOP THE DESECRATION!"

"STOP THE THIRTY METER TELESCOPE!"

A representative from Ka Leo visited the mural on Saturday and asked the artists to remove the written messages, claiming that the messages had not been approved as part of the original proposal. The artists refused to remove the writing. On Monday the artists arrived at the site of the mural to find that the entire blackboard section of the mural had been painted over with green paint. The words "Ka Leo Arts Fest" were painted in large letters over the green paint.

These events raise several free speech questions that we might ask regarding the scope of the First Amendment's protection of the artists' and protestors' rights under the United States Constitution.³⁷ However, those

37. For example, a court considering a First Amendment challenge to the school newspaper's removal of the messages painted on the blackboard portion of the mural might consider the following issues: 1) Is this removal of the written comments censorship based on the speech's content? *See, e.g.,* *Police Department of the City of Chicago v. Mosely*, 408 U.S. 92, 101-02 (1972) (holding that regulation of speech based on the content or subject matter of speech will be subject to strict scrutiny and must be narrowly tailored to serve a substantial governmental interest.). *Mosely* also held that "above all else, the First Amendment means that government has no power to expression because of its message, its ideas, its subject matter or its content." *Id.* at 95. 2) Is the construction site a public or a non-public forum? Or has the state only opened this forum in a limited way to certain speech, discriminating based on the manner of speech or the status of the speaker and not on the speaker's political message? *See, e.g.,* *Adderly v. Florida*, 385 U.S. 39, 39 (1966) (holding the jail driveway was not a public forum and that the convictions "of student demonstrators who had entered jail grounds to protest prior arrests and city segregation policies and who blocked for vehicular travel a driveway to jail entrance not normally used by the public and who did not disperse after being warned by sheriff did not deprive them of their constitutional rights to freedom of speech, press, assembly, or petition."). *Id.* at 45; *see also* *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680-81 (1992) (holding that under the First Amendment, airport terminals are "nonpublic forums," and therefore restrictions on solicitations may be allowed); *U.S. v. Kokinda*, 497 U.S. 720, 732- 33 (1990) (preventing solicitation by political group on Postal Service grounds is permissible under the First Amendment); *Greer v. Spock*, 424 U.S. 828, 838 (1976) (finding that there is no constitutional right to make political speeches on military grounds). For example, Ka Leo argued that they had approved a proposal that included visual images but not words so that the mural did not comply with their agreement with the artists. 3) Is the removal of part of the mural's content a case of the government choosing not support its own speech rather than the regulation of private speech? For example, Ka Leo might argue that the arts festival is not a public forum at all, or even the state offering its support or space to a variety of student artists. Rather, the

inquiries and the law's responses to them ignore the primary and central claims to justice asserted by the Hawaiians and their supporters who joined the demonstration. The march and the message of the mural itself claimed rights of recognition, respect and sovereignty. As my student noted in her reflection piece,

As a Kanaka Maoli, this artist cannot ignore her kuleana to speak both of our cultural and genealogical ties to this 'aina, as well as our politicized response to finding those ties continually devalued, ignored, or severed by the very institutions that claim to be built on the values of our people, but instead are built upon our piko and our iwi.³⁸

First Amendment doctrine ignores these claims, but it does more. It silences them by the same method the Framers employed to justify slavery. The law's analysis begins with a premise, an assumption, about the justice of existing title in property—including the title to the proposed location of the telescope, the title to the property upon which the demonstrators sought to place their message and the morality of ownership and dominion over a living being.

The mural and the protest contest that premise on at least three levels of analysis and definition. First, the mural gives voice to a Native Hawaiian Sovereignty claim that invokes international law to demonstrate the illegality of the United States' overthrow of the Kingdom of Hawai'i in 1893 and subsequent unilateral annexation in 1898. The State's assertions of the right to build a telescope on the mountain assumes the legality and legitimacy of its ownership and of its claim to title in land on the mountain that begins with this illegal act of occupation and possession.³⁹ Second, the State University's claim of ownership to the land on which the campus and the construction site are built also rests on this claim to title based on an illegal overthrow and occupation. Third, the mural also expresses a worldview or ontology, a definition of the Native Hawaiian self or group, that treats the mountain, Mauna Kea, as an animate, living being, as "*ohana*" (family) ancestor and relative. This worldview contests

arts festival is part of the University's curriculum and they are entitled to regulate what is in essence the school's own speech. *See also* Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Regents of University of California v. Bakke, 438 U.S. 265 (1978). Or they might contend that the University has contracted with the artists to speak on the state's behalf. If this is government speech, the government may choose any message it wants to put on its wall. If, for example, the University were contracting to paint a logo on the wall of the Stan Sherriff Stadium, the artist could not claim censorship when the University controlled the content of what she painted.

38. de Silva, *supra* note 36. .

39. *See* JONATHAN OSORIO, DISMEMBERING LAHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887 (2002); TOM COFFMAN, Nation Within: The History of the American Occupation of Hawai'i (2009); DAVID KEANU SAI, UA MAU KE EA SOVEREIGNTY ENDURES: AN OVERVIEW OF THE POLITICAL AND LEGAL HISTORY OF THE HAWAIIAN ISLANDS (2011); Kanalu Young, *Kuleana: Toward a Historiography of Hawaiian National Consciousness, 1780–2001*, 2 HAWAIIAN J. OF L. & POLITICS 1 (2006); HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER (1999).

the law's imposed definition of the mountain as inanimate property that can be owned and possessed.⁴⁰

Here, as Cheryl Harris notes in her discussion of the law's treatment of the Mashpee Indian identity, "Whiteness as property assumes the form of the exclusive right to determine the rules; it asserts that, against a framework of racial dominance and unequal power . . . [the law] asserts fairness "from a property rule, or indeed any other rule, that imposes an entirely externally constituted definition of group identity."⁴¹ Like the Mashpee, the law divests Native Hawaiians of their identity through the State's exclusive control over meaning in ways that reinforce group oppression.⁴²

Speaking of the legacy of slavery that separated the drowned from the saved when Hurricane Katrina devastated New Orleans, Professor Anthony Farley writes,

The genealogy of any object of property leads back to an original accumulation The original accumulation, the violent capture of peoples and lands that must take place in order for there to be property, appears within the legal system as a time out of mind The Middle Passage and Manifest Destiny, the original accumulation that provides the owners' initial capital, belong to that time out of mind.⁴³

Ownership divides space into *mine* or *yours* or *his* or *hers* or *theirs* or *ours*.⁴⁴

Ownership does something else as well. Ownership also makes us forget that things were not always this way⁴⁵

The Kanaka demonstrators at the mural break the silence imposed by a First Amendment premised on the legitimacy of common law title. They will not allow us to forget the violent capture of their lands, the overthrow, dispossession and accumulation that transformed their ances-

40. See IOKEPA CASUMBAL-SALAZAR, *MULTICULTURAL SETTLER COLONIALISM AND INDIGENOUS STRUGGLE IN HAWAII: THE POLITICS OF ASTRONOMY ON MAUNA A WAKEA* (2014) (PhD Dissertation in Political Science, University of Hawai'i at Mānoa) (on file with author). Salazar argues that the struggle over Mauna Kea is more than a struggle for equality, participation, money or recognition but instead is a struggle over meaning and its making. "The push for the telescope takes place within the broader context of multicultural settler colonialism under U.S. occupation: realized through law and rationalized by science (T)he mountain is not only sacred because, as some suggest, it provides a means by which to advance political interests, but rather because the mountain is the embodiment of an ancestor in a land-based onto-genealogical relationship that informs contemporary articulations of aloha'aina, anti-colonial work, indigeneity, the natural and the sacred." *Id.* at vii.

41. Harris, *supra* note 1 at 1766.

42. *Id.*

43. Anthony Farley, *The Station*, in *AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA* 151 (David Dante Troutt, ed., 2006).

44. *Id.* at 150.

45. *Id.* at 151.

tor, Mauna Kea, into property that can be owned.⁴⁶ They engage in open and notorious trespass on property defined by whiteness. They talk back to the law's time-out-of-mind narrative that tells us things were always this way and that keeps us from imagining that things could be different.

V. "I TOO AM HARVARD" PERFORMING RACE IN THE POST-RACIAL UNIVERSITY

"*Students See Many Sights as 'Microaggressions'*" reads the headline of a New York Times Article. The article opens,

"A tone deaf inquiry into an Asian-American's ethnic origin. Cringe-inducing praise for how articulate a black student is. An unwanted conversation about a Latino's ability to speak English without an accent. This is not exactly the language of traditional racism but they all reflect the murky terrain of the social justice word du jour—"microaggressions"—used to describe the subtle ways that racial, ethnic, gender and other stereotypes can play out painfully in an increasingly diverse culture."⁴⁷

After describing a flood of student blogs, digital photo projects, academic studies and theatre performances that have documented this phenomenon, the article frames its discussion thusly.

"What is less clear is how much is truly aggressive and how much is pretty micro—whether the issues raised are a useful way of bringing to light often elusive slights in a world where overt prejudice is seldom tolerated, or a new form of hypersensitivity, in which casual remarks are blown out of proportion."⁴⁸

Among the student theater performances and digital projects *The New York Times* article discusses is a play titled "I, Too, Am Harvard."⁴⁹ The play was written and directed by Kimiko Matsuda-Lawrence, then a sophomore at Harvard College.⁵⁰ Based on interviews conducted with 60 of her fellow black students, the playwright first conceived the play to give voice to the injury and anger that she and other black students ex-

46. As Harris points out in her discussion of *Mashpee Tribe v. Town of Mashpee*, "[b]eyond the immediate outcome of the case lies the deeper problem posed by the hierarchy of the rules themselves and the continued retention by white controlled institutions of exclusive control over definitions as they pertain to identity and history of dominated peoples." Harris, *supra* note 1, at 1765–66. In the case of the Mauna Kea Telescope, white controlled institutions define property in a way that ignores the history of violent overthrow and occupation of a sovereign nation. Moreover the law's definition refuses to acknowledge Hawaiian ontology and self-identity that views Mauna Kea as familial ancestor and spiritual being.

47. Tanzina Vega, *Students See Many Sights as Racial 'Microaggressions'*, N. Y. TIMES (Mar. 21, 2014), <http://www.nytimes.com/2014/03/22/us/as-diversity-increases-slights-get-subtler-but-still-sting.html>.

48. *Id.*

49. Kimiko Matsuda-Lawrence, *I, Too, Am Harvard* (2014) (unpublished script on file with author).

50. In the interest of full disclosure and with considerable parental pride I report that Kimiko is the daughter of Mari Matsuda and Charles Lawrence.

perienced in the wake of an opinion piece published by a white student in the Harvard Crimson.⁵¹ The piece questioned the efficacy and morality of affirmative action generally and of Harvard's consideration of race in its own admissions process. At one point in the essay its author opined, "Helping those with primarily low academic qualifications into primarily academic institutions makes as much sense as helping the visually impaired become pilots. How would you feel if you were assured before going into surgery that your surgeon was the beneficiary of affirmative action in medical school?"⁵²

The article was a direct attack on the legitimacy of black students' presence on campus and on their membership in the Harvard community. If black students hoped that Harvard would respond to this attack by vigorously defending its admissions policy and the unquestionable qualifications of its black students, no defense was forthcoming. As the playwright conducted her interviews, the theme of marginalization emerged again and again. Students' day-to-day encounters told them that they were border crossers without documentation. Their stories echoed the words of W.E.B. DuBois who attended Harvard 120 years before them when he is said to have remarked that he was "in Harvard but not of it."⁵³

To publicize the first performance of the play, the "I, Too, Am Harvard" production team produced a multimedia project and posted it on the internet.⁵⁴ In the photos, black students stand holding whiteboard signs depicting the racist encounters they have experienced at Harvard.⁵⁵

51. Sarah R. Siskind, *Affirmative Dissatisfaction: Affirmative Action Does more Harm than Good*, THE HARV. CRIMSON (Nov, 2, 2012). ("[A]ffirmative action is fundamentally flawed because it uses race instead of targeting these groups themselves. Less academically qualified applicants should be treated as such, unless they come from poorer households and therefore do not have access to the same amount of resources as other applicants. However, this would be class-based affirmative action, not race-based.").

52. *Id.*

53. W.E.B. DuBois, THE SOCIAL WELFARE HISTORY PROJECT, <http://www.socialwelfarehistory.com/eras/w-e-b-dubois/> (last visited May 20, 2015), archived at <http://perma.cc/52Q6-LRYT>.

54. *I, Too, Am Harvard*, <http://itooamharvard.tumblr.com/>, (last visited Dec. 20, 2014), archived at <http://perma.cc/9A4V-T9U3>. The online multimedia project introduced itself as follows: "A photo campaign highlighting the faces and voices of black students at Harvard College. Our voices often go unheard on this campus, our experiences are devalued, our presence is questioned—this project is our way of speaking back, of claiming this campus, of standing up to say: We are here. This place is ours. We, TOO, are Harvard. The #itooamharvard photo campaign is inspired by *I, Too, Am Harvard*, a play based on interviews with members of the black community exploring and affirming our diverse experiences as black students at Harvard College. The original play premier[ed] on Friday, March 7th, 2014 at 7 PM in Lowell Lecture Hall on the campus of Harvard College."

55. *Id.* "Having an opinion does not make me an 'Angry Black Woman'; 'I don't see color . . . Does that mean you don't see Me?'; 'My name is MONICA not 'my NIGGA''; 'Don't you wish you were white like the rest of us?'; 'NO, I did *not* immigrate to receive HIV/AIDS treatment!'; 'You're dressed like you might shoot me right now — such a thug'; 'You're LUCKY to be black . . . so easy to get into college!'; 'You aren't black on the inside'; 'Are you all so fast because you spend so much time running from the cops?'; 'You don't sound black. You sound smart';

The video and photo blog went viral and received a million and a half hits during the first week. A flood of similar performative video protests at colleges around the globe followed their lead—including “I, Too, Am Oxford,” “I, Too, Am Cambridge,” “I, Too, Am Capetown” and “I, Too, Am Princeton.”

“I, Too, Am Harvard” responds to a narrative that constructs blacks as “not of Harvard,” as not belonging to this community of the best and the brightest. The play, and the students who perform in the play and appear in the photo blog, must talk back to the narrative that says they do not belong here. They must perform race as bright, articulate, clean, and familiar with the intellectual and academic discourse that we identify with Harvard. In the play and the video they perform all of these attributes in their speech, analysis, and references to elite intellectual discourse, symbols and signs that signify Harvard. At the same time, they must resist and challenge the neo-liberal narrative that denies structural and institutional racism. The liberal narrative offers them the opportunity to pass/assimilate—to inhabit the role “not like other black people.” The narrative invites them to participate in the defamatory construction of black folks by treating their excellence as an exception (“I don’t think of you as black”). This invitation to pass/assimilate/be not-like-most-blacks requires them to remain silent about the structural and institutional racism that relegates most blacks to conditions of poverty, prison and miseducation.⁵⁶

The play places the students’ articulate brilliance side-by-side with the continuing vitality of racists’ beliefs about them and their people. This is done with scenes and signs that depict encounters with white students on campus to show the way those encounters project a racial screen (or Fanon’s epidural) on their bodies. The scenes also describe their own feelings and performed responses.

COCKTAIL PARTY: ONE SCENE FROM THE PLAY

- *We had this big cocktail party and one of the old grad’s wives was there. When I say old, I mean, this guy’s wife was like 70. And I was in full black-tie attire. While I was pouring myself a glass of champagne at the bar she came and she took the champagne out of my hand. And I was, like, “Excuse me?” And she’s said, “Oh, I’m sorry. Was*

“The lack of diversity in this classroom does NOT make me the voice of all black people.”

56. Harris, *supra* note 1, at 1750–51. (“In fact, it is unclear what definition of equality was articulated by *Brown I*, and in this ambiguity, the property interest in whiteness continued to reside. Against the backdrop of real inequality, even as the Court abandoned the highly formalistic view of equality underpinning *Plessy*, it remained unwilling to embrace any form of substantive equality, unwilling to acknowledge any right to equality of resources.”). In the years following *Brown*, affirmative action cases have left property in whiteness in place by shaping the nature of what affirmative action is meant to accomplish. Cases like *Bakke*, *Grutter*, *Gratz*, and *Fisher* have emphasized diversity as the primary purpose of affirmative action, failing to recognize the substantive equality necessary to achieving “real equality.” This continued subordination is what the “I Too” project exposes.

that not for me?" Yup, she thought I was working. She thought I was the help, you know. And I don't know—I think I said something like, "Would you—do you want a glass of champagne?" And she said "Oh, yeah." And I introduced myself and did the whole "Nice to meet you thing, blah, blah, blah." But honestly it took all of my power not to throw up my hands in anger and disgust—and I think it's moments like that, that are really, really fucking tiring, you know? I tried to tell the other members about that and they would say, "Oh, yeah man, that sucks." But it's different, though. It's different to, like, say, "Oh, like, that sucks. That's unacceptable." But like, you don't have to deal with that on a daily basis.⁵⁷

In the post-racial narrative, the clueless white alumni's wife makes a mistake. Why take offense? Why not just correct her? The character's dilemma: Her gesture communicates her construction of black men as obviously and only suited for service—as intended to serve her. Does he ignore this gesture and absorb the injury he feels? Does he politely point out her error and allow her to excuse herself by saying I did not realize that you were one of us; that you are one of our exceptions to the general rule that blacks are only fit for service. This response requires his abandonment of his pride for his father or grandfather who might have been servants. This choice requires him to remain silent about the structural, institutional and ideological racism through which her white privilege (and more importantly Harvard's white privilege) is maintained. Or he can break that silence and make a scene, expressing his anger and lecturing this genteel white gathering on racism. That would allow his white audience to confirm their suspicions about black folks. He doesn't belong after all.

"I, Too, Am Harvard" narrates these encounters with white folks not just as "micro-aggressions"—hurtful remarks or slights hurled at black students. Rather, the play reveals narratives that construct black students as "other." We need to see your ID, find out your SAT scores, hear your articulate speech because blacks don't belong here. Of course, if you can prove—with your ID, your SAT, your articulateness—that you are not like them, then we stand corrected for our mistake. Certainly you can't complain for this small mistake, this unintended slight. Once you have shown you are not like them, once you have denied your relationship to them, we will admit you. You, too, can be Harvard.

Of course, this offer of admission requires black students' silence, requires that they not speak of the continued ideology, institutions and structures that injure their people, that require them to deny their own people and participate in their continued oppression.

Instead of accepting the invitation to pass, the Harvard students in the play stand at the back of the stage in Trayvon hoodies as a young black woman at the front of the stage sings "Strange Fruit." They say "I too am Harvard" and "I too am Trayvon." And through those words I hear, "I

57. See Matsuda-Lawrence, *supra* note 49.

want to belong to Harvard, but not to a Harvard that participates in ideological, institutional, and structural racism.”

The play breaks the silence of coerced assimilation. It does more than give voice to individual students to tell a story of slights that make them feel like outsiders. They refuse to participate in the narrative that asks them to deny their relationship with Trayvon and the Black folks who are not at Harvard. Instead, “I Too” says I am here to speak for my people to “represent” as an advocate and freedom fighter and to demand that Harvard confront how its history, privilege, and identity has always had black people at its center. “I, Too, Am Harvard” demands full inclusion at the center of today’s Harvard community and also gestures toward a Harvard history where blacks were always present, even centrally located, by virtue of their exclusion, subordination and oppression.⁵⁸ This was Langston Hughes’s meaning when he wrote, “I Too Sing America. I am the Darker Brother.”⁵⁹ Our enslavement, our oppression, our segregation, our hands serving you champagne and carrying your bags, our bodies in your prisons and our sons shot down in your streets are the obscene secrets at the heart of what it means to be Harvard, and your darker brothers and sisters will not be silent about that family history.

VI. “I CAN’T BREATHE,” “BLACK LIVES MATTER”: TRESPASSING ON THE WHITE PROPERTY OF POST-RACIAL DISCOURSE

As I write these words, 50,000 people are marching in the streets of New York, 25,000 in Washington D.C., and tens of thousands in Los Angeles, San Francisco, Chicago, Atlanta and Detroit. A St. Louis grand jury has failed to indict the police officer who killed Michael Brown in Ferguson, Missouri. In New York, the policeman who killed Eric Garner with a chokehold will not stand trial. The students at Harvard have moved their protests from the theatre and internet to the streets, as have students across the nation. Joining high school students, fast food workers, civil rights organizations, religious groups, celebrity recording artists and athletes, they march chanting “hands up don’t shoot” and “black lives matter.” They stage die-ins blocking traffic and disrupting business as usual in Harvard Yard, on the steps of Memorial Church, on Massachusetts Avenue, at the Medical School, Kennedy School, Graduate School of Education, Law School and Divinity School, even as their compatriots shut down Fifth Avenue in New York, the freeway in Oakland and Union Station in Washington, D.C.

58. See Jennifer Schuessler, *Dirty Antebellum Secrets in Ivory Towers*, N.Y. TIMES, Oct. 19, 2013, at C1 (discussing recent research exploring universities’ historical relationship with slavery, including Harvard), CRAIG STEVEN WILDER, *EBONY AND IVY: RACE SLAVERY AND THE TROUBLED HISTORY OF AMERICA’S UNIVERSITIES*, (2013).

59. Langston Hughes, *I, Too, Sing America*, POETRY FOUNDATION (1994), available at <http://www.poetryfoundation.org/poem/177020>, archived at <http://perma.cc/EKK3-J7FK> (“I, too, sing America./ I am the darker brother./ They send me to eat in the kitchen/ When company comes,/ But I laugh,/ And eat well/, And grow strong./ Tomorrow,/ I’ll be at the table/ When company comes./ Nobody’ll dare/ Say to me,/ “Eat in the kitchen,”/ Then./ Besides,/ They’ll see how beautiful I am/ And be ashamed—/ I, too, am America.”).

The banners, signs and t-shirts reading “I can’t breathe,” Eric Garner’s dying words, shout their hurt, rage, sorrow, deep sense of loss and shared injury. They speak the words “I can’t breathe” to mourn, remember, honor and speak for Eric Garner and Michael Brown. “I can’t breathe,” a lamentation for the more than twenty black people killed by the police in 2014: for Tamir Rice, Tanisha Brown, Ramarley Graham, Vernicia Woodard, Oscar Grant, Sammy Young, Latasha Harlans, Addie Mae Collins, Medgar Evers, Martin Luther King, Jr., Emmett Till, and for countless sons, daughters, sisters, brothers, mothers and fathers whose names we do not know. “I can’t breathe,” a call for help, a recognition that, even within these Ivy-covered walls, we feel our throats and souls constricted. “I can’t breathe,” a battle cry for justice. “I can’t breathe,” an alarm, a warning that racism and injustice is suffocating all of us.

Just as “I, Too, Am Harvard” expressed more than black students’ objections to campus racial microaggressions, their marches and die-ins, their t-shirts and hands held high do more than protest police violence. They also challenge the post-racial discourse that claims we have overcome our nation’s racism. They contest the claim that the law’s proclamation of formal equality disestablished the structures and institutions that maintain racial privilege and abolished property in whiteness.

In Part III of *Whiteness as Property*, Cheryl Harris examines two forms of racialized privilege—that she names “status property” and “modern property.”⁶⁰ She demonstrates how each of these is ratified and legitimized in the texts of two paradigmatic Constitutional cases, the former in *Plessy v. Ferguson*⁶¹ and the latter in *Brown v. Board of Education*.⁶² After the abolition of slavery, the system of legalized segregation conveyed to whites a host of societal privileges, including the vote, freedom to travel, attend schools, obtain work, and protection from state and private violence. Whiteness defined the structure of social relations between the individual and society and became racialized status ratified in law. Harris notes that the *Plessy* Court reaffirmed this status property in whiteness even as it denied that segregation conveyed a message of black inferiority.⁶³

Although *Brown* overturns *Plessy*’s validation of officially-sanctioned segregation and status inequality, Harris argues that *Brown* represents a “transition from old to new forms of whiteness as property.”⁶⁴ *Brown* declined to dismantle white privilege or “even to direct that the continued existence of institutionalized white privilege violated the equal protection rights of Blacks.”⁶⁵ White status privilege accorded as a legal right

60. Harris, *supra* note 1, at 1714.

61. 163 U.S. 537 (1896).

62. *Brown*, 347 U.S. 483 (1954).

63. Harris, *supra* note 1, at 1746–49. In addition to his claim that segregation violated the equal protection clause, *Plessy* argued that the refusal to seat him on the white passenger car deprived him of the reputation of being white which had an actual pecuniary value. The Court rejected *Plessy*’s claim by finding that *Plessy* was not white, but reaffirmed the status property in whiteness “by acknowledging that whites could protect their reputation of being white through suits for damages.”

64. *Id.* at 1707.

65. *Id.* at 1751.

by law was rejected, but substantive inequality produced by white domination and race segregation remained unaddressed. Thus *Brown* protected white Americans' continued expectations of race-based privilege.⁶⁶

The protests in the streets respond to the most egregious forms of state violence against people of color. The murders of Michael Brown and Eric Garner, like lynching, do more than punish without due process. They signify the state's contempt for and failure to recognize black humanity. The chant "black lives matter" contests this signification even as it cries out against unjust and unjustified murder. "Black lives matter" challenges the continuing legacy of *Plessy's* ratification of "status property" in whiteness.⁶⁷ The students contest *Brown's* protection of white expectations of race-based privilege as well. For what constitutes an expectation of white privilege if not the belief that white lives matter more than black.

At a deeper level, "I Can't Breathe" and "Black Lives Matter" articulate the everyday violence visited on black communities by the savage inequalities of segregated schools,⁶⁸ by unemployment and an ever increasing wealth gap,⁶⁹ by our disproportionate numbers in prisons⁷⁰ and

66. *Id.* at 1753.

67. *Brown* fails to articulate segregation's impermissible purpose of maintaining white supremacy, further maintaining the continuing "status" injury of the racial meaning of defacto segregation. See Lawrence, *supra* note 24; Charles R. Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of "The Id, the Ego, and Equal Protection."* 40 CONN. L. REV. 931 (2008).

68. THE CIVIL RIGHTS PROJECT, BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE (May 15, 2014), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf>, archived at <http://perma.cc/64EH-7JDU> ("In schools that are 81-100% black & Latino, over three-quarters of the students are also enrolled in schools where more than 70% of the students live in poverty. In fact, half of students in 91-100% black & Latino schools are in schools that also have more than 90% low-income students. This means that these students face almost total isolation not only from white and Asian students but also from middle class peers as well. These figures represent extreme overlaps of poverty and racial concentration and help to explain why schools with high concentrations of black and Latino students often have fewer educational resources and lower student outcomes."); see also THE CIVIL RIGHTS PROJECT, SORTING OUT DEEPENING CONFUSION ON SEGREGATION TRENDS (2014), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/sorting-out-deepening-confusion-on-segregation-trends/Segregation-Trends-Dispute-CRP-Research-ers.pdf>, archived at <http://perma.cc/9DP4-4WL5>.

69. Chris Matthews, *Wealth and Inequality in America: It's Worse Than You Think*. FOR-TUNE MAG. (Dec. 31, 2014), <http://fortune.com/2014/10/31/inequality-wealth-income-us/>. ("[T]he share of total household wealth owned by the top 0.1 percent increasing to 22 percent in 2012 from 7 percent in the late 1970s. The top 0.1 percent includes 160,000 families with total net assets of more than \$20 million in 2012.") (internal quotations omitted); see also DOUGLAS MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1998).

70. See THE AMERICAN CIVIL LIBERTIES UNION, COMBATING MASS INCARCERATION — THE FACTS (June 17, 2011), available at <https://www.aclu.org/combatting-mass-incarceration-facts-0>; *Criminal Justice Fact Sheet*, NAACP, <http://www.naacp.org/pages/criminal-justice-fact-sheet> (last visited Jan. 1, 2015), archived at <http://perma.cc/EB74-F9AG> (noting that African Americans make up roughly 1 million or 2.3 million incarcerated people, and are incarcerated at nearly six times the rate of whites. As of 2001, 1 out of 6 black men have been incarcerated.). See generally

our declining numbers in universities and the professions.⁷¹ Most black children will not die at the hands of the police, but black and brown children who attend segregated schools are “more likely to be poor, more likely to go to jail, less likely to graduate from high school, to go to college, or to finish if they go. They are more likely to live in segregated neighborhoods as adults. Their children are more likely to attend segregated schools, repeating the cycle.”⁷²

This is the violence inflicted by the “modern property” in whiteness, the expectation of white privilege, ratified and legitimized by *Brown v. Board of Education*’s failure to recognize and dismantle the substantive inequalities created and maintained by officially sanctioned white supremacy and segregation. The Rehnquist and Roberts Courts have extended the boundaries of this property in whiteness and built higher fences to protect its borders, releasing hundreds of school districts from court-ordered desegregation orders⁷³ and using the colorblind rhetoric of the anti-affirmative action cases to hold that school districts may not use race to voluntarily desegregate their schools.⁷⁴ The Supreme Court’s col-

MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

71. Nelson D. Schwartz & Michael Cooper, *Racial Diversity Efforts Ebb for Elite Careers, Analysis Finds*, N.Y. TIMES (May 27, 2013), <http://www.nytimes.com/2013/05/28/us/texas-firm-highlights-struggle-for-black-professionals.html?pagewanted=all>; see Patricia Cohen, *For Recent Black College Graduates, a Tougher Road to Employment*, N.Y. TIMES (Dec. 24, 2014), <http://www.nytimes.com/2014/12/25/business/for-recent-black-college-graduates-a-tougher-road-to-employment.html?partner=rss&emc=rss&r=0>.
72. Nikole Hannah-Jones, *How School Segregation Divides Ferguson — and the United States*, N.Y. TIMES (Dec. 19, 2014), <http://www.nytimes.com/2014/12/21/sunday-review/why-are-our-schools-still-segregated.html> (“The Normandy School district [where Michael Brown attended school] is among the poorest and most segregated in Missouri. It ranks last overall in academic performance. Its rating on an annual state assessment was so dismal that by the time Mr. Brown graduated the district had lost its accreditation . . . Just five miles down the road from Normandy lies Clayton, the wealthy county seat where a grand jury recently deliberated the fate of Darren Wilson, the officer who killed Mr. Brown. Success there looks very different. The Clayton public schools are predominantly white, with almost no poverty of which to speak. The district is regularly ranked in the top 10 percent in the state. More than 96 percent of its students graduate. Eighty-four percent head to four-year universities.”).
73. See *Freeman v. Pitts*, 112 S. Ct. 1430 (1992) (holding courts need not find that district have all portions of its desegregation plan complete before declaring it unitary and releasing it from supervision); *Oklahoma Bd. of Educ. v. Dowell*, 498 U.S. 236 (1991) (holding that as soon as a school district achieves unitary status it may be released from court ordered segregation); see also Daniel S. Levin, *Schools Re-segregate After Being Freed From Judicial Oversight Stanford Study Shows*, in STAN. NEWS (Dec. 5, 2012), <http://news.stanford.edu/news/2012/december/schools-resegregation-study-12-0412.html>, archived at <http://perma.cc/D954-2XJ6> (“[N]early half of the almost 500 school districts that were under court order to desegregate as of 1990 have been released from judicial oversight during the last two decades, resulting in a slow but steady re-segregation, as compared with districts where judicial oversight continues.”); Byron Lutz, *The End of Court-Ordered Desegregation*, 3 AM. ECON. J. ECON. POLICY 130, 164 (2011) (“[D]ismissal of a court-ordered desegregation plan produces a gradual, moderate increase in racial segregation.”).
74. *Parents Involved in Cmty. Sch. v. Seattle*, 551 U.S. 701 (2007). [Hereinafter “PICS”]. In PICS, Chief Justice Roberts claims he is invoking the spirit of *Brown v. Board of*

orblind doctrine and the post-racial discourse it fosters ratifies modern white property claiming that structures and institutions that exclude, imprison and police us erect no borders, no walls that deny access or signify status, bestow no property defined by whiteness.

This discourse invites some to pass, to gain access to the modern property of whiteness by putting on our masks,⁷⁵ by accepting the invitation to exceptional status, by denying ourselves. We are offered the opportunity to join a master narrative that pretends that race does not matter and that racism no longer exists. The young people in the streets reject this offer when they chant “black lives matter,” when they wear “I can’t breathe” shirts as they warm up for basketball games,⁷⁶ and raise their hands in solidarity with Michael Brown’s dying gesture,⁷⁷ when they claim Mauna Kea as living ancestor and relative against an occupying state’s claim of ownership,⁷⁸ when they wear their “Danger” shirts and invite their grandmothers to class. They answer Cheryl Harris’s call to engage in open and notorious trespass on white property and reclaim it as a commons, and I marvel and rejoice at the clarity of their voices and the sight of their beauty.

Education: “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” although his holding prevents the school district from remedying the status quo of a de facto segregated school system where white children in white neighborhoods attend the best schools. In PICS, the white plaintiff challenging Seattle’s desegregation plan argues that her 14th amendment right to equal protection has been violated because the school district has considered her child’s race in order to maintain some modest desegregation in its schools. At bottom this is an argument that the district’s desegregation would redistribute privilege (property) from whites that get to go to the best schools under the status quo to some black and brown children who would attend those schools instead. In essence the Court holds that the plaintiff’s settled expectations of the status quo of white privilege have been violated, the “modern” whiteness as property right that Harris’s analysis identifies in *Brown*.

75. See Lawrence, *supra* note 18; Margaret E. Montoya, *Máscaras Y Trenzas: Reflexiones Un Proyecto De Identidad Y Análisis A Través De Veinte Años*, 36 HARV. J. L. & GENDER 469 (2013).

76. Dave Zirin, *#BlackLivesMatter Takes the Field: A Weekend of Athletes Speaking Out*, THE NATION (Dec. 8, 2014), <http://www.thenation.com/blog/192121/blacklivesmatter-takes-field-weekend-athletes-speaking-out>, archived at <http://perma.cc/K6UT-HCFA>; see also Dave Zirin, *The Power of Political Athletes to Puncture Privilege*, THE NATION (Dec. 12, 2014), <http://www.thenation.com/blog/192777/power-political-athletes-puncture-privilege>, archived at <http://perma.cc/G6S6-7REF>; Dave Zirin, *Lesson Learned: High School Hoops Team Disinvited From Tournament Over ‘I Can’t Breathe’ Shirts*, THE NATION (Dec. 27, 2014), <http://www.thenation.com/blog/193881/lesson-learned-high-school-hoops-team-disinvited-tournament-over-i-cant-breathe-shirts>, archived at <http://perma.cc/HL45-GWYR>.

77. See R.B. Fallstrom, *St. Louis Rams Protest Ferguson Decision with ‘Hands Up’*, THE HUFFINGTON POST (Nov. 30, 2014), http://www.huffingtonpost.com/2014/11/30/rams-ferguson-hands-up_n_6245294.html, archived at <http://perma.cc/FBY2-H3XL>.

78. See Iokepa, *supra* note 40.